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In the Supreme Court
of the United States

No. 644

OCTOBER TERM, 1966

EXLEY EXPRESS, INC.,

Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

On Appeal from the United States District Court for the District of Oregon

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Revised Rules of this Court, appellee Albany Food Products, Inc., moves that the judgment of the District Court be affirmed.

STATEMENT

In its Statement of the Case appellant places major emphasis upon the shipments shown in an exhibit presented at the earlier Commission hearing, held February

1, 1960. (J.S. at 5-6.) This may be misleading inasmuch as appellant barely mentions the supplementary exhibit listing twice as many shipments, which was presented at the second Commission hearing, held December 14, 1960.

In addition, appellant insists upon matching shipments transported before the critical date with those transported thereafter, identical both as to exact commodity and points of origin and destination. This was rendered obsolete by the decision of this Court in *Willis Shaw Frozen Exp., Inc.* v. *United States,* 377 U.S. 159 (1964) and detracts from the true import of appellee's "grandfather" operations as reflected in its shipment exhibits. These shipments were analyzed by the Commission in the appendices to the reports and orders attached to the complaint as Exhibits C and D.

Enumerated in such appendices are 97 shipments transported in 1957 and in 1958 prior to May 1. One hundred eighty-five shipments were transported thereafter, to and including the month of January 1960. Another classification of the origin and destination points set forth in the Commission's analysis is attached to this motion to affirm as Appendix A and Appendix B. This classification does not segregate frozen vegetables, frozen berries, and frozen fruits since the three commodities were obviously transported as a single class. This was the conclusion of the Commission in the report and order under attack.

ARGUMENT

This appeal presents no question warranting plenary consideration by this Court. The Commission's order attacked herein was issued pursuant to criteria set forth in *Willis Shaw Frozen Exp., Inc.* v. *United States, supra,* and the issues raised by appellant here were there presented and decided.

The Commission's reports and orders which preceded the report and order under attack herein were made prior to the *Shaw* decision. In those earlier reports the Commission considered frozen vegetables, frozen berries, and frozen fruits as three separate commodities as a matter of law. The Commission then authorized the continuance of "grandfather" operations only to the extent that a shipment occurring after the critical date was a repetition of a shipment occurring before that date of the same commodity between the same origin and destination points. Only in such instances, according to the Commission's interpretation of section 7(c) of the Transportation Act of 1958 (49 U.S.C. § 303(b)(6), as amended by § 7 of Pub. L. 85-625) was the "statutory prerequisite of continuity of operation" established (Exhibit A to Complaint at 4).

By treating frozen vegetables, berries, and fruits separately and confining its consideration only to those shipments prior to the critical date which were repeated thereafter, areawide "grandfather" authority was rarely granted by the Commission, since at least the smaller carrier was unable to show repetitive shipments

to a sufficient number of points in a given territory to be representative of the whole (Exhibit D to Complaint at 6).

The Commission's "tabulator" approach to the granting of "grandfather" authority under the Transportation Act of 1958 was sustained in the following district court decisions, all in orders unaccompanied by written opinions: *Battaglia* v. *United States,* Civil Action No. 61-321, D. Ore., March 29, 1962; *Consolidated Freightways, Inc.* v. *United States,* Civil Action No. 40438, N.D. Calif., May 3, 1962; *Olmstead* v. *United States,* Civil Action No. 5480, W.D. Wash., May 17, 1962; *Northwest Fisheries Transp., Inc.* v. *United States,* Civil Action No 5418, W.D. Wash., May 17, 1962; *Home Transfer & Storage Co.* v. *United States,* Civil Action No. 62-297, D. Ore., October 22, 1962; *Willis Shaw Frozen Exp., Inc.* v. *United States,* Civil Action No. 1655, W.D. Ark., February 11, 1963, reversed 377 U.S. 159.

Thereafter following, in close succession, were four district court decisions resulting in remands to the Commission for the correction of errors. These remands were obviously due to the Commission's basically incorrect conception of its responsibility, the end result of which was "grandfather" grants so narrowly drawn as to bear no reasonable relationship to the purpose of the "grandfather" clause—to grant to those coming under regulation authority to continue existing operations. The remanding district court decisions are as follows: *Winter Garden Company* v. *United States,* 211 F. Supp.

280 (E.D. Tenn. Oct. 22, 1962); *Jarman* v. *United States,* 219 F. Supp. 108 (D. Md. June 18, 1963); *Frozen Food Express* v. *United States,* 219 F. Supp. 131 (N.D. Tex. July 8, 1963); and *Hale Distributing Company* v. *United States,* 221 F. Supp. 266 (S.D. Cal. July 10, 1963).

The litigation finally culminated May 4, 1964, in the decision of this Court in *Willis Shaw Frozen Exp., Inc.* v. *United States, supra.* The Commission's order (89 M.C.C. 377) which had been sustained by the district court, *supra,* granted Shaw the right to haul frozen vegetables, berries, and fruits from named origins to named destinations and then, considering frozen vegetables, berries, and fruits separately, from other named origins to other named destinations, thus completely "atomizing" Shaw's "grandfather" rights. The district court was reversed in a per curiam decision in which this Court stated as follows:

> "We think *United States* v. *Carolina Freight Carriers Corp.,* 315 U.S. 475, 62 S. Ct. 722, 86 L. Ed. 971, requires reversal of the judgment and a remand to the Commission for reconsideration in light of appellant's status and performance as a common carrier, the transportation characteristics and marketing pattern of these seasonal agricultural products, and the demonstrated ability of appellant to perform the services." (*Willis Shaw Frozen Exp., Inc.* v. *United States, supra,* 377 U.S. at 159-160.)

The Commission thereafter interpreted the mandate of this Court to allow a finding that frozen vegetables,

berries, and fruits had been handled by a carrier as a single commodity class. The Commission concluded, in its reconsideration of *Shaw* (99 M.C.C. 141), as follows:

> "It is manifest that our function in administering the 1958 'grandfather' Act is not to freeze an applicant's operations into a precisely delineated, point-for-point operation exactly corresponding to points where shipments have previously moved if, in fact, that applicant has held itself out and provided service to representative points throughout a particular area or territory."

In the order under attack herein the Commission found that the frozen vegetables, berries, and fruits transported by appellee had been transported as a single commodity class. In view of appellee's holding out to transport the three commodities indiscriminately throughout the entire area of its operations and the fact that appellee's transportation service during the entire period covered by its shipping exhibits was rendered with but one tractor-trailer unit, it is obvious that the three frozen commodities were transported as a single commodity class.

"The transportation characteristics and the marketing pattern of these seasonal agricultural products" (*Willis Shaw Frozen Exp., Inc.* v. *United States, supra,* at 160), which renders unrealistic a grant of point-to-point authority is clearly indicated by the large number of origin and destination points involved in appellee's 282 representative shipments. The fact that a number of appellee's shipments of a particular commodity handled before the critical date were not repeated thereafter

between the same origin point and the same destination point, hardly warranted the Commission's "pre-Shaw" conclusion that the statutory prerequisite of continuity of operation was not established. To the contrary, the absence of repeat shipments and the new origin and destination points served after but not before the critical date verifies the contention that the origin and destination points of this particular traffic change from year to year in the normal course of business, being attributable to the special characteristics of the commodities.

Appellant complains that the Commission's order violates the "substantial parity" rule that has prevailed in determining "grandfather" applications since *Alton R. R. Co.* v. *United States,* 315 U.S. 15 (1942) (J.S. at 8).

The *Alton* case furnishes no support whatever for appellant's position that the "substantial parity" rule has here been violated. That case affirmed the Commission's grant of a "grandfather" certificate authorizing the transportation of automotive vehicles to all points in certain states even though the proof showed that deliveries had only been made to several points in some of the states. As to whether the Commission had power to authorize operations in an entire state where only a few points in that state had been served, the Court stated as follows (the quotation also appears in *Jarman* v. *United States, supra,* at 115 and, partially, in *Winter Garden Company* v. *United States, supra,* at 285):

> ". . . while the test of "bona fide operation' within a specified 'territory' includes 'actual rather than potential or simulated services' (*McDonald* v.

> *Thompson,* 305 U.S. 263, 266), it does not necessarily restrict future operations to the precise points or areas already served. The characteristics of the transportation service rendered may of necessity have made trips to any specified locality irregular or sporadic. And they may likewise have restricted prior operations to but a few points in a wide area which the carrier held itself out as being willing and able to serve . . ." (*Alton R. R. Co.* v. *United States, supra,* 315 U.S. at 21.)

Appellant contends that appellee's "grandfather" authority should be limited to the results of the tabulation of before and after shipments of a particular commodity which moved between the same origin and destination points This contention was rejected in *Alton R. R. Co.* v. *United States, supra,* and *United States* v. *Carolina Freight Carrier's Corp.,* 315 U.S. 475 (1942), cases arising under the Motor Carrier Act of 1935 (49 U.S.C. § 306) and in *Willis Shaw Frozen Exp., Inc.* v. *United States, supra,* with respect to the Transportation Act of 1958. As this Court stated in the *Carolina* case (partially reproduced in *Frozen Food Express* v. *United States, supra,* at 139):

> ". . . For this Act should be liberally construed to preserve the position which those like appellee have struggled to obtain in our national transportation system. *To freeze them into the precise pattern of their prior activities, as was done here, not only may alter materially the basic characteristics of their service, it also may well be tantamount to a denial of their statutory rights."* (*United States* v. *Carolina Freight Carriers Corp., supra,* 315 U.S. at 488.) (Emphasis added.)

CONCLUSION

The order of the Commission delineating the scope of appellee's "grandfather" authority was based on the proper legal standards, and was supported by adequate findings, which in turn were supported by substantial evidence. This appeal presents no substantial question warranting review by this Court and the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX A

Origins of Shipments of Frozen
Vegetables, Berries, and Fruits
Transported by Albany Food Products, Inc.

1957 to and including January 1960

Oregon	*California*	*Washington*
***Albany	**Anaheim	**Arlington
*Corvallis	**El Centro	**Burlington
**Dayton	*Fullerton	*Centralia
*Portland	*Los Angeles	*Chehalis
**Stayton	**Modesto	***Kent
*Weston	**Oakland	***Mt. Vernon
*Woodburn	*Oxnard	***Seattle
	**Pasadena	*Spokane
	**Sacramento	**Sumner
	*San Jose	***Tacoma
	**Sanger	**Wenatchee
	*Santa Clara	
	***Watsonville	

* Shipments before but not after May 1, 1958.
** Shipments after but not before May 1, 1958.
*** Shipments both before and after May 1, 1958.

APPENDIX B

Destinations of Shipments of Frozen Vegetables, Berries, and Fruits Transported by Albany Food Products, Inc.

1957 to and including January 1960

Oregon	*California*	*Washington*	*British Columbia*
***Albany	***Alameda	***Arlington	***Chilliwack
***Corvallis	**Culver City	***Burlington	**Haney
***Eugene	**Anaheim	***Seattle	*New Westminster
***Salem	***Glendale	***Tacoma	**Sardis
***Portland	***Hayward		**Vancouver
	***Los Angeles		
	*Milbrae		
	*Modesto		
	***Oakland		
	**Pasadena		
	*Patterson		
	*Redwood City		
	*San Diego		
	**Sacramento		
	***San Francisco		
	**Santa Barbara		
	**Ventura		
	***Watsonville		

* Shipments before but not after May 1, 1958.
** Shipments after but not before May 1, 1958.
*** Shipments both before and after May 1, 1958.